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Supreme Court, U.S.
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No. 03-____

In The

Supreme Court of the United States

AVE M. BIE, BURNEATTA BRIDGE, and ROBERT M. GARVIN, Commissioners of the Public Service Commission of Wisconsin, in their official capacities,

Petitioners,

v.

WISCONSIN BELL, INC., d/b/a Ameritech Wisconsin, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Telecommunications Act of 1996 ("Act"), Congress enacted a national framework for the development of local telecommunications competition, supplanting decades of state-sanctioned local service monopolies. To open these markets, Congress established new procedures in the Act, 47 U.S.C. § 252, for the negotiation and arbitration of interconnection agreements and the development of statements of generally available terms and conditions ("SGATs"), pursuant to which competing providers could gain entry through interconnection, resale, or access to the incumbents' unbundled network elements. In order to administer this new scheme for the development of competitive local markets, Congress sought to encourage the cooperation of state regulatory commissions by giving them opportunities to (1) participate directly in the administration of § 252, and (2) implement their own pro-competition measures provided they are consistent with the Act.

The question presented is whether a state commission order is consistent with the Act's provisions allowing additional pro-competitive state measures when the order requires, without setting rates, terms, or conditions, the tariffed offering of certain combinations of an incumbent provider's unbundled network elements.

PARTIES TO THE PROCEEDING

The petitioners are Ave M. Bie, Burneatta Bridge, and Robert M. Garvin, in their official capacities as Commissioners of the Public Service Commission of Wisconsin. One original Commissioner defendant, Joseph P. Mettner, left office and was replaced by Burneatta Bridge on January 6, 2003.

Respondents in the case are Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin (n/k/a SBC Wisconsin), the plaintiff-appellee, and WorldCom, Inc., an intervening defendant-appellant.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Wisconsin Bell, Inc., v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003). The decision of the United States District Court for the Western District of Wisconsin is *Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin v. Bie, et al.*, Case No. 01-C-0690-C (W. D. Wis. September 26, 2002)(Opinion and Order) and is unreported. The decision of the Public Service Commission of Wisconsin ("Commission") is in two parts in *Investigation Into Ameritech Wisconsin Operational Support Systems*, Docket No. 6720-TI-160 (Pub. Serv. Comm'n Wis. Sept. 25, 2001)(Final Decision (Phase I)) and (Pub. Serv. Comm'n Wis. Nov. 14, 2001)(Order Denying Rehearing and Corrections to Final Decision (Phase I)) (collectively, "*OSS Final Decision*"). Only the Final Decision (Phase I) is reported in electronic format, at 2001 WL 1671061.

All of the foregoing decisions are set forth in the Appendix of the Petition for a Writ of Certiorari filed by WorldCom, Inc., in *Wisconsin Bell, Inc., v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003), *petition for cert. filed,* (U.S. Oct. 17, 2003)(No. 03-603).[1]

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion in this matter and entered judgment

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[1] Hereinafter all references to pages of the Appendix of WorldCom's Petition for a Writ of Certiorari (U.S. 03-603) will be denoted by "Ap-W.," followed by the relevant page number. References to the pages of the appendix of this petition will be denoted by a preceding "Ap."

on August 12, 2003. The Commissioners are filing this Petition for a Writ of Certiorari within 90 days of the entry of judgment. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the certain sections of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). The principal sections at issue are codified at 47 U.S.C. §§ 251, 252, and 261. Also at issue is § 601(c)(1) of the Act, which is published as an uncodified note to 47 U.S.C. § 152. State statutes, especially Wis. Stat. §§ 196.03(6), 196.19(1), 196.196(2)(a) and 196.219(2m), also concern this case. Relevant constitutional and statutory provisions are in the Appendix to this Petition.

STATEMENT OF THE CASE

At issue here is whether a state commission order requiring the tariffing of certain wholesale interconnection access services for use by competing providers is consistent with the Telecommunications Act of 1996.[2] In a 2-1 decision the Seventh Circuit determined that the existence of negotiation and arbitration procedures in § 252 of the Act provided an exclusive process for competitors to interconnect with an incumbent's network and consequently preempted the Commission's action. This holding, however,

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[2] Pub. L. 104-104, 110 Stat. 56 (1996)(hereinafter referred to as "1996 Act" or "Act"). The Act is codified throughout Title 47 of the United States Code. References to the Act are to relevant sections of Title 47 and are denoted by the symbol "§," except as otherwise noted.

is the result of a flawed preemption analysis, as well-critiqued in the dissent, and directly conflicts with rulings of two other circuits and the Federal Communications Commission ("FCC") that validate tariffing as a means of state action consistent with the Act. Most critically, the ruling substantially undercuts Congress' scheme that expressly authorizes state action to promote local telecommunications competition by means consistent with the 1996 Act. Without tariffing, a state commission cannot effectively promote competition, and without state action, Congress' preservation of parallel, pro-competitive state action is thwarted.

This case arises from the Final Decision (Phase I) order of the Public Service Commission of Wisconsin that requires Wisconsin Bell, Inc., d/b/a SBC Wisconsin ("Wisconsin Bell"), to tariff its offering of two combinations of unbundled network elements ("UNE"): unbundled network element-platforms ("UNE-P")[3] and extended enhanced link (or lines) ("EEL").[4] Both offerings constitute UNE combinations providing access to the network of the incumbent telecommunications carrier per § 251(c)(3). The Commission began this investigative proceeding to assure Wisconsin Bell's wholesale products and operational support systems ("OSS") used by competitors to access its network provided competitors a meaningful opportunity to compete. In the Final Decision (Phase I), the Commission ordered tariffing of UNE-P and EEL combinations pursuant to state

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[3] A UNE-P is a simple combination of all of the elements, principally the local loop and switching, that may be combined to form local voice-grade service. Ap-W. 54a.

[4] An EEL is typically a high-capacity circuit or channel comprised of unbundled loops and transport between two points, typically between a customer and a long distance provider, or between a customer and an Internet Service Provider. Ap-W. 46a.

law. Ap-W. 37a-75a. Wisconsin Bell sought rehearing, but the Commission denied the petition. Ap-W. 76a-87a.

On December 13, 2001, Wisconsin Bell filed a complaint in federal district court for declaratory and other relief from the provisions of the Final Decision (Phase I).[5] Wisconsin Bell alleged *inter alia*, that the Commission was preempted by the interconnection procedures of the Act from ordering the tariffing of existing and new UNE-P and EEL combinations. Wisconsin Bell asserted federal question jurisdiction under 47 U.S.C. § 252 and 28 U.S.C. §§ 1331, 1337, 2201, and 2202, and named the individual commissioners as defendants to enjoin them from enforcing their decision.

The district court subsequently ruled on September 26, 2002, granting declaratory relief. The district court ruled that the Commission's requirement for tariffing of the combinations of unbundled network elements was preempted because an "exclusive method" for such offerings is specified in the negotiation and arbitration procedures in 47 U.S.C. § 252. Ap.-W. 30a-32a. Consequently, an entrant's right to resort to a tariff offering of the same UNE combination "evad[es] the interconnection agreement process in § 252," and "completely displaces the incumbent's ability to negotiate through congressionally prescribed interconnection agreements . . . ." Ap-W. 31a-32a.

The district court entered judgment on September 30, 2002. Ap-W. 35a-36a. WorldCom, Inc., an intervenor in the

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[5] The complaint also included review of the Commission's Order Denying Rehearing and Corrections to Final Decision (Phase I), dated November 14, 2001, but that order is not relevant here.

lower court, filed an appeal on October 28, 2002, with respect to the district court's preemption decision on the second claim. The Commissioners filed a parallel notice of appeal on October 29, 2002. Both appeals alleged appellate jurisdiction under 28 U.S.C. § 1291.

The court of appeals issued its decision (Ap-W. 1a-18a) and entered judgment (Ap-W. 19a) affirming the district court on August 12, 2003, with Judges Richard Posner and Frank Easterbrook writing the majority opinion, and Judge Richard Cudahy the dissent. This Petition for a Writ of Certiorari follows.

The Commission Decision

The Commission ordered Wisconsin Bell to tariff its UNE-P and EEL service offerings "as a general proposition," based on finding that "competition will be enhanced, consumer choices increased, and existing telecommunications facilities will be efficiently utilized." Ap-W. 46a, 56a. These findings tracked with factors in Wis. Stat. § 196.03(6) that the Commission is statutorily directed to apply in assessing the overall public interest, especially the promotion of telecommunications competition. Ap-W. 46a, 49a. The Commission concluded, under Wis. Stat. §§ 196.02, 196.04, 196.219(3)(a) and (f), 196.219(4)(a), 196.37(2), and 196.199(2),[6] that it had state law authority to

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[6] Wis. Stat. § 196.02, in particular sub. (1), provides the Commission with general supervisory jurisdiction over public (including telecommunications) utilities. Wis. Stat. § 196.04 is the Commission's long standing jurisdiction to order the physical connection of, and set terms and conditions for, interconnection of telecommunications networks. Wis. Stat. §§ 196.219(3)(a) and (f) compel telecommunications providers to provide additional interconnection and UNE access upon Commission order, while Wis. Stat. § 196.219(4) and 196.37(2) provide the jurisdiction to administratively enforce the

require the tariffing of the two services to promote competition. Ap-W. 55a. Taken together, the foregoing state statutes authorize the Commission through administrative directives, such as a "just and reasonable" order compelling the tariffing of a service, to promote competition in telecommunications services. Ap-W. 55a.

Cognizant of the issue of possible federal preemption, the Commission also concluded that its order was "protected as additional, consistent, pro-competitive state action by §§ 251(d)(3), 252(e)(3), and 261(c)."[7] In general, these federal statutes permit states to require additional access and to take competitive actions, beyond the federal minimums, provided the actions are consistent with the Act. Ap-W. 56a-57a.

As the required UNE-P and EEL offerings qualified as unbundled access under Wis. Stat. § 196.01(1b),[8] the

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foregoing duty with "just and reasonable" orders. Wis. Stat. § 196.199(2) specifically authorizes the Commission to do every thing necessary and convenient with respect to the approval and enforcement of § 252 interconnection agreements. See Ap. 22a-27a and 29a-31a for specific texts.

[7] Section 251(d)(3) precludes FCC action that would bar state action that (1) establishes access and interconnection obligations of local exchange carriers, (2) is consistent with § 251, and (3) "does not substantially prevent implementation of requirements of this section and purposes of this part." Ap. 6a. Section 252(e)(3) permits a state commission to establish or enforce requirements of state law in the course of reviewing a § 252 agreement, and § 261(c) permits a state to impose requirements that are necessary to further local telecommunications competition, "so long as the State's requirements are not inconsistent with this part [II] or the [Federal Communications Commission's ("FCC")] regulations to implement this part." Ap. 16a-17a, 20a.

[7] See Ap. 21a.

Commission ordered Wisconsin Bell to tariff them in compliance with the mandatory access tariffing provisions of Wis. Stat. §§ 196.196(2)(a) and 196.219(2m),[9] but did not specify rates, terms, and conditions. Ap-W. 57a, 59a. The Commission rejected Wisconsin Bell's argument, based on *Verizon North, Inc. v. Strand*, 140 F. Supp. 2d 803, 809-10 (W.D. Mich. 2000)("*Verizon North*")[10] and *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1177-79 (D. Or. 1999), that the Commission was preempted from ordering tariffing of the services. Responding to those cases, the Commission found that the tariffed offerings could not "create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether." Ap-W. 57a. Furthermore, concluded the Commission, the terms of § 252(f)(1) envision tariffing to satisfy the requirements of a statement of generally available terms ("SGAT")[11] and the protection of state action in

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[9] See Ap. 26a, 28a. Under its election of price-regulation pursuant to Wis. Stat. § 196.196(1), Wisconsin Bell's access rates are not subject to traditional substantive Commission rate-making jurisdiction, but the tariff publication requirements in Wis. Stat. §§ 196.196(2)(a) and 196.219(2m) still apply.

[10] *Affirmed in relevant part, vacated in part, Verizon North, Inc., v. Strand*, 309 F.3d 935 (6th Cir. 2002), *cert. denied*, __U.S.__, 123 S. Ct. 1649 (2003).

[11] An SGAT is a summary of the terms and conditions under which a Bell Operating Company, such as Wisconsin Bell, § 153(4), "offers" interconnection, resale, and access to unbundled network elements, and satisfies other requirements of § 251 of the Act. Significantly, sub. (2) of the section, defining state commission review, expressly permits a reviewing state commission to enforce "other requirements" of state law in the conduct of the review. Wis. Stat. § 196.19, 196.196(2)(a) and 196.219(2m), require that all telecommunications utility's services, including wholesale access be tariffed. The Commission had ordered Wisconsin Bell under these statutes to tariff wholesale access services when Wisconsin Bell previously submitted an SGAT (ultimately rejected) for Commission review in *Matters Relating to Satisfaction of*

§§ 251(d)(3), 252(e)(3) and 261(c), "strongly imply that Congress was not generally preempting state power to order tariffing of services otherwise consistent with the Act." Ap-W. 57a.

The District Court Decision

The district court held that the Commission's order for tariffing was inconsistent with the Act's procedures in § 252 and, therefore, the Commission was preempted from ordering the tariffing of UNE-P and EEL service offerings. Ap-W. 33a-34a. The tariff requirement allowed an entrant to unilaterally choose a tariff over an interconnection agreement, thereby displacing the "incumbent's ability" to negotiate UNE-P and EEL offerings through the interconnection agreement process. Ap-W. 31a, 33a. The district court rejected defendants' arguments citing the validation of tariffs implicit in *U.S. West Commun's., Inc. v. Sprint Commun's. Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002)(holding that a § 252 agreement may reserve the right of a party to resort to a tariff for services) and the Federal Communications Commission's *Texas Preemption Order.*[12] Ap-W. 33a. Requiring the incumbent to file public tariffs "evades the exclusive process required by the 1996 Act," held the district court, citing *Verizon North.* Ap-W. 31a-32a.

Conditions for Offering InterLATA Service (Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin), Docket No. 6720-TI-120, slip op. at 92 (Pub. Serv. Comm'n Wis. Dec. 12, 1996).

[12] *In the Matter of the Public Utility Commission of Texas*, 13 F.C.C.R. 3460, 3522-26, ¶¶ 138-39, 1997 WL 603179 (1997) (Memorandum Opinion & Order) (affirming as optional and not preempted a Texas statutory requirement that an incumbent's wholesale resale tariff must offer a minimum five percent discount from comparable retail rates).

The Court of Appeals Decision

Majority: The court of appeals majority framed the question before it as "whether a state may create an alternative method by which a competitor can obtain interconnections rights." Ap-W. 2a. Recognizing that the Act provides that a state's regulations concerning local competition "are not preempted, 'if such regulations are not inconsistent with the provisions of [the Federal Telecommunications Act],'" Ap-W. 2a-3a, the majority nonetheless determined that the state's tariffing requirement must be preempted because it "*has* to interfere with the procedures established by the federal act." Ap-W. 6a.

The majority's analysis starts with a discussion of tariff services and the bare premise that a "carrier or utility is constrained to fix a rate no higher than necessary to cover the cost of the service." Ap-W. 4a-5a. From this the court reasoned that Wisconsin Bell's "pricing freedom" is constrained by the likely upper end of the "range of prices" resulting from a negotiation, as a competitor would likely expect to do better in negotations. Ap-W. 5a. The majority determined, based on two Commission orders in *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161,[13] issued six months after the *OSS Final Decision* appealed here, that the Commission requires tariffed rates based on its prescribed cost-accounting procedures and thus "is making the tariff in a realistic sense." Ap-W. 5a.

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[13] Final Decision, *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161, at 22-23, (Pub. Serv. Comm'n Wis. Mar. 22, 2002) and UNE Compliance Order, *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161, at 61 (Pub. Serv. Comm'n Wis. July 9, 2003). Hereinafter collectively referred to as the "*UNE Final Decisions*."

The majority determined that the tariffing requirement "places a thumb on the negotiating scales" against the local incumbent by forcing it to state its "reservation price,"[14] the disclosure of which allows a competitor to choose to seek a lower price "by challenging the tariff before the state regulatory commission, with further appeal possible to a state court." Ap-W. 6a. Furthermore, a tariff "shortcircuits negotiations, making hash of the statutory requirement" that delays arbitrations for 135 days of negotiation. Ap-W. 7a. Lastly, the "pro-competition" interpretations of the Commissioners and WorldCom upset the Act's "compromise between interest groups." The majority concluded that the § 252 negotiation procedure in the Act "provides the local phone company with a degree of protection it would lack" if a state-ordered tariff enabled "would-be entrants to bypass the federally ordained procedure." Ap-W. 7a.

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[14] While the majority did not define "reservation price," the term has been defined elsewhere as that price, for a seller, that is "the minimum amount that the seller would rationally accept." *Matter of Valuation Proceedings Under Sections 303(c) and 306 of the Regional Rail Reorganization Act of 1973*, 531 F. Supp. 1191, 1218 (Sp. Ct. R.R.R.A. 1981). Reservation prices are usually secret or unknown in negotiations; "few bargainers reveal their reservation prices." *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 704 F.2d 1325, 1344 (7th Cir. 1986).

Dissent:

Judge Richard Cudahy opined in dissent that the "only question . . . is whether a Wisconsin order requiring an incumbent carrier to offer by tariff the same network elements available by negotiated and arbitrated interconnection agreements is 'inconsistent' with the 'provisions' of the Act." Ap-W. 10a. Specifically, Judge Cudahy rejected as unsupported by the Act, the majority's core conclusion that the Act has authorized "only one method to achieve interconnection and establish its terms." Ap-W. 18a.

According to Judge Cudahy, the Act's terms limited its preemptive power and, in fact preserved "an important and integral role" to state commissions. Ap-W. 8a-9a. Judge Cudahy disagreed with the majority's conflict preemption ruling for several reasons. First, the majority followed the Sixth Circuit's error in misinterpreting *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992) because, unlike the statutes at issue in *Gade* that intended to occupy the entire field, the Act is the exact opposite, "specifically embrace[ing] . . . parallel regulation." Ap-W. 11a. Second, the FCC-mandated ubiquitous application of TELRIC[15] cost methodology to set UNE prices rendered unrealistic the majority's concern that the state's tariffing requirement is somehow a "thumb on the negotiating scale." Because of the federal TELRIC, the state commission's retain a "central" role, but one that is subject to federal court review under 28 U.S.C. § 1331. Wisconsin Bell's

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[15] "TELRIC" denotes "Total Element Long Run Incremental Cost," a methodology specified for pricing unbundled network elements necessary for interconnection under the Act. *See* 47 C.F.R. §§ 51.1, 51.501-505. The rules were ultimately upheld in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

reservation price in practice is "quasi-public in all interconnection environments," so a tariff "does not impede the right of an entrant to demand negotiation." Ap-W. 14a-15a. Lastly, the majority "goes seriously astray" (Ap-W. 16a) in speculating about possible terms based upon Commission *UNE Final Decisions* not at issue here. The OSS access tariffs clearly may be filed and revised by Wisconsin Bell without Commission approval. Ap-W. 16a-17a. Thus, for the dissent, the differences between tariffing and § 252's procedures are "matters of form, not involving substance, and are not inconsistent with the provisions of the Act." Ap-W. 17a.

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant certiorari because court decisions of different circuits are diametrically opposed as to whether required tariffing is a pro-competitive state commission administrative action consistent with the Telecommunications Act of 1996. The Seventh Circuit's erroneous ruling effectively preempts <u>any</u> state administrative device, tariff or otherwise, that is the least bit different from the procedures in § 252 of the Act. Contrary to the letter and the intent of the Act, the Seventh Circuit's ruling effectively declares that "consistent with the Act" really means "identical to the Act."

This holding completely nullifies any practical ability of a state commission to use the authority under the Act to advance any state pro-competition measure that is consistent with Act, but may go beyond the Act's minimums. Moreover, the Seventh Circuit's ruling slows the development of the very competition sought by the Act by effectively allowing every incumbent to force <u>all</u>

interconnection through the time frames in § 252 procedures—even where a new competitor would be willing to take a tariff price to speed market entry.

Most importantly, the erroneous ruling makes a "hash" of the cooperative federalism designed for the Act's administration. By declaring the exclusivity of § 252 procedures and their preemptive effect upon the historical state commission tariffing power, the Seventh Circuit decision denies any meaningful opportunity for state commissions to promote state competition objectives in concert with the Act. Without tariffing, their explicit right under the Act, to promote their own state-law objectives, if "consistent" with the Act, is thus rendered unusable and essentially meaningless. As construed by the Seventh Circuit, the Act preempts state authority in spite of explicit policy incentives Congress enacted to encourage state participation in the Act. Using the Seventh Circuit ruling, incumbents will likely cause a flood of litigation seeking preemption of any state-law pro-competition measure. The tariffing issue has already lead to judicial review of agency tariff decisions in Michigan[16] and Oregon,[17] as well as the Wisconsin decision at issue here. The Act's cooperative federalism scheme—and indeed, its competitive market objective—is put at substantial and needless risk because

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[16] *E.g.*, *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 1649 (2003) (preempting tariffed services as improperly permitting "complete bypass" of § 252 procedures) and *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348 (6th Cir. 2003) (validating pre-Act tariffs for wholesale services).

[17] *MCI Telecommuns. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Or. 1999)(holding structure of tariffs improperly permitted "off the rack" ordering of services that dispensed with interconnection agreement altogether).

state commissions will not be able to use state authority to advance local telecommunications competition.

This Court should undertake review in order to confirm that under the Act tariffing is not preempted, but permitted, and enables Congress' objective of enlisting the states to develop local telecommunications competition under the new "national policy framework" of the Act. H.R. Conf. Rep. No. 104-458, at 1, 113 (1996).

I. THE SEVENTH CIRCUIT'S HOLDING THAT A STATE REQUIREMENT FOR TARIFFING OF CERTAIN WHOLESALE UNE SERVICES IS PREEMPTED BY THE PROCEDURES IN § 252 OF THE 1996 ACT CONFLICTS WITH DECISIONS OF THE SIXTH AND TENTH CIRCUITS AND THE FCC.

The Seventh Circuit's opinion that tariffing is in effect facially preempted by § 252 procedures contradicts the decisions of the Sixth and Tenth Circuits that sustain tariffing as a tool for state action. The split among the circuits constitutes a substantial basis for grant of the petition for certiorari. Sup. Ct. R. 10(a). Under the ruling at issue, Wisconsin is effectively denied "equal access" to the Act's provisions that preserve substantive state pro-competitive measures that are consistent with the Act. A national act that issues the identical invitation to the states to participate in the Act should not be construed to give significantly different rights among the states. It is wholly unacceptable to let the split caused by the ruling deny tariffing authority to Wisconsin, but not to other states, such as Michigan. By granting review the Supreme Court can correct a serious interference with the uniformity of Congress' intended

design for state participation in the administration of the 1996 Act.

Moreover, the Seventh Circuit's ruling differs strongly from holdings of the FCC, the federal agency charged with administering the Act. This major variance is also a basis for grant of certiorari. *See, e.g., FPC v. Texaco, Inc.*, 417 U.S. 380, 383 (1974) (District of Columbia Court of Appeals decision reviewed because it set aside an agency order purporting to deregulate certain gas producers and assert new authority) and *Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 343 (1979) ("We granted certiorari on the strength of the Committee's representations that this ruling could seriously interfere with the implementation of national monetary policy.")

Two courts of appeal have ruled correctly to validate tariffing ordered under state law. First, in *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 358-60 (6th Cir. 2003)("*Michigan Bell*"), the Sixth Circuit held that Michigan's 1991 requirement for wholesale tariffs for rates, terms, and conditions for basic local exchange service were not impliedly preempted by the 1996 Act, "so long as the regulations do not interfere with the ability of new entrants to obtain services." While *Michigan Bell* concerned a pre-Act tariff requirement preserved by § 261(b), the instant case deals with a new post-1996 tariffing requirement ordered by the Commission as an additional pro-competition state action protected by § 261(c). The Sixth and Seventh Circuit decisions are diametrically opposed, however, on the propriety of a tariff requirement that is consistent with the Act and intended as additional state action to promote local telecommunications competition. Where the Seventh Circuit majority determined tariffs are preempted because they interfere with § 252

procedures, the Sixth Circuit had no problem upholding the tariff requirement: "The Act . . . recognizes that interconnection agreements are not the sole way to promote competition among local service providers, for it allows room for state regulation." *Michigan Bell*, 323 F.3d at 359. Assuming no prohibition in the interconnection agreement, "the agreement and the Michigan tariff obligations can co-exist and work in concert to promote local service competition. . . . Under the system of cooperative federalism established by the Act, it is permissible for Michigan to maintain a tariff system alongside the agreements negotiated under the Act." *Id.* at 359-60.

In the second decision, the Tenth Circuit impliedly upheld the validity of tariffed wholesale interconnection services. In *U.S. West Commun's., Inc. v. Sprint Commun's. Co., L.P.*, 275 F.3d 1241, 1251 (10th Cir. 2002), the Tenth Circuit determined that the express terms of an interconnection agreement could reserve to a new entrant the right to buy interconnection services from the incumbent's tariff, thereby permitting the new entrant to buy on terms set either by the interconnection agreement or the tariff. This position necessarily implies that tariff offerings are valid and compatible with the Act. Otherwise, it would have been illogical for the Tenth Circuit to hold that agreements may incorporate tariffs that are "preempted"—and thus void—by the existence of the Act's own procedures.

The FCC, as the federal agency charged with administering the Act, has held that "Congress has made clear that the States are not ousted from playing a role in the development of competitive telecommunications markets," and has held lawful a provision of state law that permitted new entrants to purchase local service for resale from the incumbent's tariff at a mandated five percent discount.

Texas Pre-emption Order, 13 F.C.C.R. at 3486, 3522-3526, ¶¶ 52, 139-141. Because the Texas commission continued to award larger resale discounts in § 252 arbitrations, the FCC determined that the discount resale tariff was treated as an "option," and did not, in practice, supersede or negate any provision of the Act, including access to §§ 251 and 252. *Id.*, 13 F.C.C.R. at 3526, ¶ 139.

The FCC's position in the *Virginia Preemption Order*[18] does not invalidate consistent state tariff requirements. In the *Virginia Preemption Order*, the FCC only determined that the incumbent's tariffs, which were incorporated by reference in a § 252 agreement, could not become effective without the entrant's consent or a state commission order if the tariffed rates "materially and adversely" affected the terms of the agreement. *Id.*, 17 F.C.C.R. at 27,326, 27,330, ¶¶ 590, 600. Nowhere in the order, however, did the FCC reject the contemplated tariffs as preempted or precluded by § 252 procedures. The FCC's discussion presumed the validity of tariffs; otherwise the FCC would have dismissed the parties' disagreement respecting the resort to tariffs as mooted by the requirements of § 252.

The FCC, rather than the courts, should set the guidelines for participation in the administration of the new regime, according to this Court. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.6 (1999) ("*AT&T*"). Because the FCC is the agency to which Congress has delegated

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[18] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 F.C.C.R. 27,039, 27,329-31, ¶¶ 599-602, 2002 WL 1576912 (2002) (Memorandum Opinion & Order).

implementation of the Act, the FCC is "uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) (citation and internal quotation omitted). That the FCC has not preempted state-required tariffing should be accorded substantial weight in view of its role in administering the Act. *Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (substantial deference due statutory interpretation by agency charged with administering the statute).

In light of the foregoing, the Seventh Circuit's decision preempting state tariffing clearly differs diametrically from the position of two other circuits and the FCC. This Court needs to review the issue to assure the proper uniformity of the Act's interpretation.

II. THE SEVENTH CIRCUIT'S PREEMPTION HOLDING IS INCORRECT BECAUSE IT IS BASED UPON AN INCOMPLETE AND FLAWED ANALYSIS.

The Seventh Circuit majority wrongly concluded that any tariffing required by a state commission is preempted by the purportedly exclusive procedures of § 252. Had the majority fully examined the Act's text and structure according to Supreme Court preemption methodology, it could not have reached its preemption conclusion.

In determining preemption, a court's "sole task is to ascertain the intent of Congress." *California Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272, 280 (1987). The

Supreme Court has recognized three forms of preemption: (1) by Congress "so stating in express terms," if within constitutional limits; (2) by implication "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation; and (3) when federal law conflicts with state law and compliance with both is a "physical impossibility," or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 280-81 (citations omitted).

The Supreme Court has stated that the interpretation of the statutes at issue "does not occur in a contextual vacuum," but is "informed by two presumptions about the nature of preemption." *Medtronic*, 518 U.S. at 485. The first presumption is that in fields traditionally occupied by the states, the Court proceeds with the assumption that historic police powers of the state are not superseded by federal action "unless that was the clear and manifest purpose of Congress." *Id., citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The second presumption is that the "touchstone" of the analysis of the scope of preemption is Congress' purpose, "primarily . . . discerned from the language of the preemption statute and the 'statutory framework' surrounding it." *Id.* "Also relevant, however, is the 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486 (plurality opinion)(citations omitted).

Neither the majority nor the dissent mentioned that the Act nowhere expressly preempts state tariffing, and in

unstated agreement, moved on to the other categories of preemption. But in delving into the Act, the majority's analysis went wrong from the start.

First, the majority made no mention of the historical presumption against preemption of matters where states have historically legislated. This failure leads to the majority framing the question too broadly, whether a state commission may provide an "alternative method" for interconnection. Ap-W. 2a. The dissent, in contrast, properly commenced its analysis with the presumption. Ap-W. 8a. By applying the historical presumption against preemption, and considering § 261(b), which specifically preserves state regulations prior to the Act if they are consistent with the Act, and § 601(c)(1), which bars implied preemption of state law, unless expressly provided, the dissent properly reasoned that the question is simpler, whether the Commission's tariffing requirement is consistent with the Act. Ap-W. 8a-10a. Had the majority considered the same sections, it should have agreed with the dissent that § 601(c)(1) "precludes a broad reading of preemptive authority," *City of Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999), and that §§ 261(b) and 601(c)(1) indicate that Congress "explicitly disclaimed an intent categorically to pre-empt state law[.]" *Guerra*, 479 U.S. at 281 (express disavowal of preemption in Pregnancy Discrimination Act of 1978 precluded finding that Congress preempted state employment discrimination law either expressly or by implication from comprehensive statutory scheme).

Second, the majority initially treats the preemption issue involved as one of conflict preemption (Ap-W. 3a, 6a), but concludes by establishing an implied preemption in the exclusivity of § 252 procedures. The majority asserted conflict preemption when it stated that the tariff requirement

"*has* to interfere with the procedures established by the federal act," Ap-W. 6a, but fails to cite any demonstrable interference with the operation of the Act. But, by taking away the states' necessary power to order tariffing of services, the majority creates an implied preemption of any state commission right to advance competition. The ruling makes surplusage of the terms of §§ 251(d)(3), 252(e)(3) and 261(c) that preserve state jurisdiction. The majority nowhere confronts how its denial of the states' tariffing means ends up substantively removing the states from developing competitive local exchange telecommunications markets, an outcome contrary to §§ 261(b) and (c) and 601(c)(1).

Third, the text and structure of the Act also refute the majority's preemption analysis. As noted above, nowhere has Congress in the Act expressly preempted state tariffing requirements or made § 252 negotiation and arbitration procedures exclusive. It could have easily used the term "preemption," as it did in §§ 252(e)(5) (FCC may preempt a state failing to act under § 252), 253(d) (authorizing FCC to preempt state requirements inconsistent with the § 253(a) and (b)), and 276(c)(preemption of state payphone services inconsistent with the Act). Rather, Congress employed broad, general terms that clearly encompass tariffing as a protected state action device. For example, § 251(d)(3) authorizes states to impose additional access "obligations," and § 261(c) generally permits additional state "requirements" that are consistent with part II of the Act and FCC regulations.

Fourth, the Act's provision for an SGAT in § 252(f)(1) to summarize available access services, clearly contemplates the co-existence of tariffs and interconnection agreements. Tariffing *per se*, therefore, cannot be considered directly in conflict with the Act, and thus preempted. This argument is

never addressed by the majority. Section 252(f)(2) specifically reserves state jurisdiction in an SGAT review to enforce other provisions of state law. Wisconsin law requires Wisconsin Bell to offer services via tariff.[19] Thus, Wisconsin Bell's manner of "offering" wholesale interconnection access services under § 252(f)(1) necessarily requires it to comply with state tariffing requirements for the offering of any wholesale telecommunications utility services, such as UNE-P and EEL access services. Moreover, § 252(f)(5) provides that while an SGAT is pending, and after approval, a Bell Operating Company, such as Wisconsin Bell, must still negotiate § 252 interconnection agreements. Thus, the framework of § 252(f) clearly contemplates that Wisconsin Bell could simultaneously serve some competitors with tariffed services and others under approved interconnection agreements. Section 252 agreements cannot have exclusive effect without rendering § 252(f)(5) mere surplusage.

Fifth, Judge Cudahy correctly noted that the majority's analysis followed the error of the Sixth Circuit decision in *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) by citing out of context the principle in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992) (state law is preempted if it interferes with the methods by which the federal statute was designed to reach its goals). The Federal Occupational Safety and Health Act ("OSHA"), the statute at issue in *Gade*, was clearly intended to establish federal occupation of the entire field. Ap-W. 11a. The Act, however, as noted by the dissent, plainly gives the states a "key role in the regulatory scheme" for local telecommunications. Ap-W. 11a.

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[19] Wis. Stat. §§ 196.19(1), 196.196(2)(a) and 196.219(2m).

Congress intended the state commissions to help advance local telecommunications competition. The majority miscast the question at issue because it did not follow the Court's preemption methodology, an inductive approach based upon contextual analysis of an act's structure, language, and text.

III. THE PREEMPTION OF STATE TARIFFING UNDERCUTS CONGRESS' PRESERVATION OF SUBSTANTIVE STATE JURISDICTION AUTHORIZING IMPLEMENTATION OF STATE COMPETITION POLICIES CONSISTENT WITH THE ACT.

Congress' objective of federal and state cooperation to develop competitive local telecommunications markets is wholly frustrated because the Seventh Circuit's preemption ruling essentially holds that § 252 procedures exclude tariffing as a state tool to promote the availability of certain wholesale services useful to competition in the local telecommunications market.

This is not a typical federal preemption case precisely because of the context of Congress' invitation to the states to participate in the Act's cooperative federalism[20] for developing local telecommunications competition. Congress clearly wanted the states to help administer the Act, so in the Act's "complex regulatory scheme," Congress created an

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[20] "The Act exemplifies a cooperative federalism system, in which state commissions can exercise their expertise about the needs of the local market and local consumers, but are guided by the provisions of the Act and by the concomitant FCC regulations, [citation omitted], and checked by federal court review for consistency with these federal provisions." *Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd. of P.R.*, 189 F.3d 1, 14 (1st Cir. 1999).

"invitation . . . to the states to participate in the federal regulation of interconnection agreements and other aspects of the local telephone market," to "voluntarily regulat[e] on behalf of Congress" as "'deputized' federal regulator[s]." *MCI Telecommuns. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 343-44 (7th Cir. 2002).

Sections 251 and 252 of the Act provide a scheme that specifies numerous functions that state commissions may perform—if they so choose. *See* § 252(e)(5). But Congress also provided two types of provisions to encourage actual state cooperation. First, to obviate state commission concerns about available administrative resources, Congress sanctioned enforcement of state law requirements in conjunction with the § 252 procedures. *See, e.g.*, §§ 252(e)(3), 252(f)(2) and 252(g). In §§ 252(e)(3)[21] and 252(f)(2),[22] Congress explicitly permitted a state commission to enforce state law requirements in the course of reviewing a § 252 agreement or SGAT. In § 252(g),[23] Congress authorized consolidated proceedings under §§ 214(e), 251(f), 252, and 253 "in order to reduce administrative burdens on . . . . the State commission in carrying out its responsibilities under [the] Act."

Second—and more critically—Congress explicitly provided the opportunity for state commissions to engage in substantive policy making under state law to promote competition, so long as such actions are consistent with the Act's applicable limits. Sections 251(d)(3), 252(e)(3) and 261(c) exemplify Congress' preservation of state policy jurisdiction. Section 251(d)(3) precludes the FCC from

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[21] Ap. 16a-17a.
[22] Ap. 18a.
[23] Ap. 19a.

barring imposition of additional state access regulations that are substantially consistent with the Act. Section 252(e)(3), besides offering an administrative efficiency, also protects a commission's ability to enforce state law requirements. This provision specifically enables the Commission to pursue state competition objectives[24] if the opportunity arises in a § 252 review of an agreement. Finally, subsections (b) and (c) of § 261 preserve pre- and post-Act state measures that advance competition in local exchange telecommunications, provided, generally, that the actions are not inconsistent with the Act or relevant FCC regulations.

Two years before Congress passed the 1996 Act, the Wisconsin Legislature enacted a pro-competitive deregulatory policy for telecommunications in 1993 Wis. Act 496 ("Act 496"), also known as the Information Superhighway Law. The comprehensive revision of state telecommunications law, enacted in a special legislative session, transformed state regulatory policy from traditional rate-of-return regulation to one favoring competition as the principal means of delivering telecommunications services to state consumers. *See* Wis. Stat. § 196.03(6) and 133.01.[25] The Legislature directed the Commission to oversee the effort to develop and promote competition in local exchange and other telecommunications markets, subject to appropriate consumer protection and other safeguards. The Legislature set up specific safeguards and procedures to check the power of incumbent monopoly providers,

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[24] Wis. Stat. §§ 196.03(6) and 133.01. Ap. 22a-23a, 21a.

[25] Wis. Stat. § 196.03(6)(a), enacted in 1993 Wis. Act 496 and effective September 1, 1994, incorporates Wis. Stat. § 133.01, Ap. 21a-22a, which makes competition the "fundamental economic policy of the state," requiring regulatory agencies to pursue the maximum level of competition, "consistent with other public interest goals established by the legislature."

specifically including in Wis. Stat. § 196.219(3)(f) the power to require additional unbundling of an incumbent's network elements. Such additional unbundling qualifies as "access" under Wis. Stat. § 196.01(1b) and must be tariffed by providers, such as Wisconsin Bell, under the requirements of Wis. Stat. §§ 196.196(2)(a) and 196.219(2m).

In the *OSS Final Decision* at issue here, the Commission specifically used state law[26] in reliance upon Congress' explicit protection of state jurisdiction in §§ 251(d)(3), 252(e)(3), and 261(c) to proactively order tariffing of UNE-P and EEL offerings as an additional pro-competitive measure. Ap-W. 46a, 49a, 55a-57a. The Commission especially relied upon §§ 251(d)(3) and 261(c) because they permit proactive state action, such as the tariffing the Commission ordered here.[27] Act 496 represents the very kind of pre-Act regulation that Congress protected in § 261(b), and the order for tariffing is exactly the kind of additional pro-competition measure for local exchange competition protected by § 261(c).

The Commission's tariff requirement benefits a competitor without harming the incumbent. An incumbent like Wisconsin Bell is not harmed, because, as recognized by the dissent, Ap-W. 15a, 17a n.7, Wisconsin Bell's pricing is already "quasi-public" and the company retains the ability to alter TELRIC rates if its costs change. The incumbent, however, cannot be allowed to use the time frames in § 252 procedures to delay a contract between an incumbent and a

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[26] *See*, *supra*, p. 5, listing state laws relied upon.

[27] In contrast, § 252(e)(3) depends upon carriers initiating a § 252 review and whether the parties raise a disputed issue during the course of the review that might provide a vehicle for declaring a state commission competition goal. Sec. 252(b)(4)(A).

competitor where price is not the issue. The Commission's tariff requirement benefits competition by permitting a competitor, as business needs require, to evaluate the costs of using a tariffed UNE-P or EEL offering and avoiding most § 252 negotiation expenses,[28] against the potential costs of lengthy § 252 negotiations with the incumbent.

Tariffing is an essential state commission tool for advancing the scope of wholesale services offered by the incumbent. To be sure, not all state-ordered tariffs are automatically protected by the Act, especially if their content or structure in some way precludes or creates a complete bypass of § 252 procedures.[29] But tariffing *per se*, is not and cannot be preempted as a "contrary" procedure. The Act already deliberately gives the competitor the choice to resort to § 252 procedures in order to open the network of the monopoly incumbent, which has "no economic incentive, except for §§ 271 and 274, to afford competitors interconnection."[30] The tariff requirement is hardly more compulsory or intrusive.

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[28] The Commission has pointed out that, typically, notwithstanding the use of a tariff for pricing terms, § 252 contract may "wrap around" the core tariff bargain such collateral matters as ordering, billing, liability, and other business-to-business arrangements. Initial Brief of Defendants-Appellants Ave M. Bie, *et al.*, at 32, *Wisconsin Bell, Inc. v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003)(Nos. 02-3854 & 02-3897).

[29] The Commission concluded in the *OSS Final Decision* that, together, the two services at issue "cannot create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether." Ap-W. 57a.

[30] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 F.C.C.R. 15499, 15528, ¶ 55 (1996), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th

The issue of federal preemption of ordinary state procedural means is essentially the same concern that prompted Supreme Court review in *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), a case involving federal preemption of state towing safety regulations. The Supreme Court held in that case that "[i]t is unlikely that Congress would preserve States' power to enact safety rules and, at the same time, bar the ordinary method by which States enforce such rules—through their local instrumentalities." *Ours Garage,* 536 U.S. at 436. In the context of the Telecommunications Act of 1996, it is equally unlikely that Congress preserved the jurisdiction of the states to act to promote competition, and, at the same time, barred the long-standing state commission use of tariffing as a means to make the incumbent's wholesale services more readily available to competitors.

By barring tariffing, however, the Seventh Circuit ruling forces all state pro-competition measures through the constrained funnel of private provider negotiations under § 252, thereby virtually eliminating a state commission's ability to proactively advance state competition policies consistent with the Act. Ironically, the court's unwarranted preemption of a state tariff requirement in favor of § 252 procedures extinguishes any real substantive policy-making preserved to the states by the Act. The Seventh Circuit's ruling effectively removes any positive policy incentives for the states[31] from Congress' provisions in the Act for

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Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[31] Without state policy opportunities, the state commissions might see more burden than benefit in administering § 252 arbitration and approval procedures.

encouraging state participation, especially §§ 251(d)(3), 252(e)(3), and 261(c). This case thus parallels *Ours Garage*: it is unlikely that Congress wrote provisions in the Act preserving state jurisdiction to promote competition, and, at the same time, impliedly barred the states' expected tariffing means of exercising that jurisdiction.

In sum, the preemption of state tariffing is inconsistent with the Act's preservation of state substantive policy jurisdiction in §§ 251(d)(3), 252(e)(3), and 261(c) to encourage state cooperation in administering the Act. The specific question is whether under the Act a state commission may order the tariffing of certain UNE services. But the more important question immediately behind the face of the challenge is whether the Act's cooperative federalism will be maintained as Congress designed it—especially if § 252 procedures are "exclusive" of any state method, tariff or otherwise, to advance competition. The Seventh Circuit's erroneous preemption ruling must be reviewed by this Court.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request grant of the writ of certiorari.

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